Supreme Court of the United States

OCTOBER TERM, [redacted] 1925

No. [redacted] 320

In the Matter

of

The Application of H. ELY GOLDSMITH, a Certified Public Accountant of the State of New York, for a peremptory or alternative Writ of Mandamus, and for a Temporary and Permanent Injunction,

Plaintiff-in-Error,

against

UNITED STATES BOARD OF TAX APPEALS,

Defendants-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR.

H. ELY GOLDSMITH,
Certified Public Accountant,
Plaintiff-in-Error in Person,
Office and P. O. Address,
105 West Fortieth Street,
New York, N. Y.

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PLAINTIFF-IN-ERROR'S BRIEF.

Statement.

This is an action in error from the decision of the Court of Appeals of the District of Columbia in an appeal by H. Ely Goldsmith, hereinafter called "Petitioner," from an order of the Supreme Court of the District of Columbia sustaining a demurrer by the respondents, United States Board of Tax Appeals, to a reply of the petitioner to the answer of the respondents, and dismissing the petition and rule to show cause in an application by H. Ely Goldsmith, a Certified Public Accountant of the State of New York, for a writ of mandamus directing the Board of Tax Appeals to permit petitioner to represent Taxpayers before the said Board.

The court below affirmed the action of the Supreme Court of the District of Columbia (p. 48, Record).

The answer of the respondents admits the following parts of the first cause of action contained in the petition.

1. That petitioner is a Certified Public Accountant (fols. 2, 14).

2 and 3. That pursuant to an act of Congress shortly styled the "Revenue Act of 1924" there was created as an independent agency in the executive branch of the Government, the United States Board of Tax Appeals (fols. 2, 14).

4. That, in July, 1924, the Board promulgated certain rules (fols. 3, 14).

5. That the petitioner made application pursuant to such rules (fols. 4, 14).

6. That petitioner was notified a Committee would pass upon his application (fols. 5, 14).

7. That certain Taxpayers in whose behalf the petitioner intended to act were notified by the Board that petitioner "had not yet been admitted to practice" (fols. 5, 6, 14).

8. That under date of September 27, petitioner was informed by the Board that his application for authority to practice before the Board had been "received, considered, and denied" (fols. 6, 14).

Of the remaining allegations of the first cause of action, *the respondents admit:*

10. That due demand has been made by petitioner and his request was denied (fols. 7, 14).

11. That petitioner has not been called before the Board for any hearing or explanation (fols. 7, 14).

14. That no appeal is possible from the decision of the Board of Tax Appeals, denying petitioner's application and that petitioner has no other remedy except mandamus (fols. 8, 15).

Of the second cause of action in the petition, *the Board admits:*

15. That the Board is an independent agency of the executive branch of the Government (fols. 9, 15).

The Board *denies* the following allegations:

9. That petitioner's right to appear in behalf of taxpayers is valuable to him and that he is well qualified and that he will be damaged unless he be permitted to represent clients (fols. 7, 15).

11. That there was nothing before the Board from which the Board could conclude that petitioner was not the proper person to be admitted to practice before such Board (fols. 7, 14).

12. That they have denied petitioner a just, legal, substantial right and that they have acted in an arbitrary, wrongful, tyrannical and capricious manner (fols. 7, 14).

14. That petitioner's right to practice, etc., is a substantial asset and the denial of his opportunity to practice will cause substantial damage (fols. 7, 14).

Of the second cause of action, the Board *denies:*

16. That it has no statutory or other authority to make rules limiting taxpayers in the choice of their agents (fols. 9, 15).

17. That through the unauthorized refusal, etc., the petitioner is barred from his just, legal rights (fols. 9, 16).

The *respondents' answer to the petition* sets forth the following *affirmative defenses:*

(a) In answer to paragraph 14th of petitioner's petition, the Board denies petitioner has any right to practice except in behalf of a corporation, of which petitioner is an officer; or of a partnership of which petitioner is a partner (fol. 14).

(b) In reply to paragraph 16 of the petition, the

Board asserts that it has authority to make rules, limiting taxpayers in the choice of their agents, both under Sec. 900 (H) of the Revenue Act of 1924 and under the Common Law (fol. 15).

(c) As bearing upon the merits of their refusal, the respondents claim in Sec. 18 of their Answer, that they appointed a committee which made certain investigations and found that petitioner is not of proper moral fibre to be permitted to practice before it and they come to their conclusion upon the following alleged facts (fol. 16):

FIRST.—That petitioner in the case of People ex rel. Goldsmith against Travis, 167 A. D., 475, 152 N. Y. Supplement 1058, was denied reinstatment after discharge from a Civil Service position and that the record shows that petitioner violated the duties of his position, and the confidence imposed in his integrity by publishing certain information which he had no right to make public (fol. 17).

SECOND.—That petitioner filed an application, etc., for admission as claim agent before the Treasury Department and that such application was denied. They attach to their answer copies of Treasury Department records which they claim are true copies of material portions of the record (fol. 17).

The reply of the petitioner to the allegations of the answer shows:

1. As to the investigation made by the respondents marked "First" above, that the Board had not fully investigated the matter and that the petitioner had the right as well as the duty to make public this information and has obtained a judgment of the Supreme Court of New York to that effect (fols. 64, 65).

2. As to the allegation marked "Second," above, Petitioner claims that it is at best hearsay evidence, that only part of the Exhibits attached to respondents' an-

swer constitute the record of the hearing and that the balance is extraneous matter (fols. 65, 66).

3. Petitioner further alleges that if the respondents desired to make a mere brief of counsel to the Commissioner of Internal Revenue part of their deliberations, they should have made the brief of respondent's (Petitioner's) counsel part of the record also (fol. 65).

To the reply of Petitioner, the Respondents filed a demurrer alleging that the reply was bad as a matter of law.

Questions Involved.

The questions involved, stripping the matter of all legal verbiage and technicalities, are:

1st. Does the United States Board of Tax Appeals have power to create a class of attorneys who alone are authorized to represent Taxpayers before said Board?

2nd. If the Board has such power, did it act properly in denying petitioner's application without giving Petitioner a chance to explain what they considered a bad record?

3rd. Is the Petitioner, upon the allegations of the petition, answer and reply, entitled to a peremptory writ of mandamus, or if not, is petitioner entitled to have the question of arbitrary action by the Board tried out as a question of fact upon the issuance and return of an alternative writ?

Errors Relied Upon.

Again stripping this record of all technicalities, the Petitioner-Appellant relies upon the following errors of the courts below:

1. That the court below erred in holding that the Board of Tax Appeals has power to adopt rules for

the admission of attorneys and to enforce such rules.

2. That the court below erred in holding that it appears from the papers that in passing upon the application of petitioner, the Board has properly exercised its discretion and that they have not acted arbitrarily, etc., in denying his application without giving him an opportunity to explain the matters set forth in their answer and in his reply to their answer.

3. That the court below erred in holding that the Board of Tax Appeals in considering petitioner's application *might properly consider mere hearsay evidence and other evidence which could not be admitted as evidence in a proceeding at law,* and therefore acted properly.

4. That the court below erred in holding that the acts of the respondents could not be questioned in a mandamus proceeding because petitioner had failed to ask them for a hearing before they denied this application.

5. That the court below erred in refusing petitioner an alternative writ and a trial on the merits upon its return.

Statement of Points of Law and Fact.

POINT I.

The Board has no express statutory authority to make and enforce rules for the admission of attorneys.

POINT II.

The Board has no common law rights whatever.

POINT III.

There is no implied authority of Executive Departments to prescribe and enforce rules for admission of attorneys.

POINT IV.

If Congress had intended to give this Board such power as is claimed by it, it would have said so specifically.

POINT V.

If the respondents had the power to make rules, they failed to exercise their prerogative in the proper manner in the case at bar.

POINT VI.

Notwithstanding their power of subpoena, the defendants form an administrative Board, and not a judicial tribunal.

POINT VII.

The court below had jurisdiction of the parties and of the subject matter of this controversy.

Parties and Attorneys.

The petitioner H. Ely Goldsmith appears in person.

The individual members composing the respondent, the Board of Tax Appeals, appeared on the return day of the petition individually, denied that the Board as such is sueable but consented to be sued individually in this manner as if the action had been originally brought against them.

The petitioner accepted the offer but no change was made in the caption of this case by the court below, the respondents waiving the clerical change in open court.

Peyton Gordon, Esq., United States Attorney for the District of Columbia, appeared with Mr. Vernon E. West, Assistant United States Attorney, as Counsel in the courts below.

The Attorney-General and the Solicitor-General appeared for defendants in error here.

There has been no other changes of parties or attorneys.

ARGUMENT.

POINT I.

The board has no express authority to make and enforce rules for the admission of attorneys.

Subdivision "H" of Sec. 900 provides that the proceedings of the Board shall be conducted "in accordance with such *rules of evidence and procedure* as the Board may prescribe."

Even the proverbial Philadelphia lawyer will not classify a rule designed to limit taxpayers in the choice of their agents as a rule of evidence, nor can the Board justify its action upon the ground that to make such rules is part of prescribing a procedure.

We have been unable in all the digested reports to find an instance even where any administrative board or executive department has ever tried to do what the respondents here assert they have a right to do.

It is a well known rule of statutory construction that where a statute specifically states the power of a public officer, the statement of such power is a limitation upon the officer.

Expressio unius est exclusio alterius (*Aultman & Taylor Co.* v. *Syme*, 163 N. Y., 54, 57).

There is no authority in the courts to supply omissions of the statutes (*Cotheal* v. *Cotheal*, 40 N. Y., 405, 410; *Benton* v. *Wickwire*, 54 N. Y., 226, 228; *Daly* v. *Haight*, 170 App. Div., 469, 473; *F. A. Bank* v. *Colgate*, 120 N. Y., 381, 394). In the latter case the court said:

> "The language of a statute should be given its natural and obvious import. The court cannot correct errors or cure supposed defects in legislation."

To the same effect we read in *Shoemaker* v. *Hoyt*, 148 N. Y., 425, 431:

> "Contracts or statutes are to be read and understood according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their cooperation. Courts cannot correct suspected errors, omissions or defects, or by construction vary the contracts of parties. If the words employed convey a definite meaning, and there is no contradiction or ambiguity in the different parts of the same instrument, then the apparent meaning of the instrument must be regarded as the one intended" (*Shoemaker* v. *Hoyt*, 148 N. Y., 425, 431, and authorities here cited).

In an opinion for the court delivered by Mr. Chief Justice Waite in the case of *Morrill* v. *Jones*, 106 U. S., 466, the learned Justice stated:

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

We must conclude, therefore, that the respondents have no other power than that set forth in the statute.

POINT II.

The respondents have no common law rights whatever.

As we understand the law there is no common law right whatever in the District of Columbia. But if there were remaining in the said District any vestige of common law we fail to see how it could be construed in favor of a statutory body created in 1924.

But if there really were any common law rights, this

court is respectfully referred to the argument of Theodore W. Dwight, Esq., in the Matter of Henry W. Cooper, 22 N. Y., 67, beginning at page 68. It seems that Mr. Dwight in his historical outline of the question of admission of attorneys adequately disposes of the contention made by the respondents herein.

In this view we are not disturbed by the reference of the United States Supreme Court in *Matter of Secombe*, 19 Howard, 9, to "Common Law Courts." Not necessary to the decision of the question therein, the reference seems to be mere dicta.

POINT III.

There is no implied authority of executive departments to prescribe and enforce rules for admission of attorneys.

The Treasury Department has a special Statute authorizing it to make rules and regulations governing the recognition of Agents and Attorneys or other persons representing *claimants* before the Department (23 Stat. 258, Act of July 7, 1884, Chapter 334, Paragraph 3), *but for no other purpose.*

The Patent Office seems to be authorized under Sec. 487 of the Revised Statutes to refuse to recognize Patent Agents for *gross misconduct.*

The Pension Office has similar authority in regard to *limiting compensation.*

As special provision for such rules by statute in the case of these Departments was found necessary there seems to be no reason to assume that such authority as claimed by respondents exists in an executive department *except when specially given by statute.*

Even the authority of the *United States Courts* to prescribe rules for the admission of attorneys *is statutory.*

Section 272 of the Judicial Code reads as follows:

> "* * * In all the courts of the United States, the parties may plead and manage their own cases personally or by the assistance of such counsel or attorneys at law as, by the rules of these said courts, respectively, are permitted to manage and conduct cases therein."

If the authority to restrict the appearance before the United States Courts is not an inherent or implied privilege *even of the United States Courts*, then a mere executive body certainly cannot be heard to claim such a privilege as its "implied authority."

See also *Matter of Cooper*, 22 N. Y., 90.

The main stay of the Appellees and the sole authority cited by the court below for its decision is the case of *Manning* v. *Franch*, 149 Mass., 391. But Sec. 3 of the Act of June 23, 1874, being Chapter 459 of the Laws of the 43rd Congress does not create *the Alabama Claims Commission*, as Appellees contend, but it creates the "*Court of Commissioners of Alabama Claims*" and provides a number of JUDGES for such COURT.

The Massachusetts Court deciding the case of Manning v. Franch, supra, did not go deeply enough into the matter to determine where that court got the powers which it upheld in the above case. It merely held without giving reason therefor that they believed that that court had been given the powers which it claimed for itself. That power undoubtedly came from Sec. 272 of the judicial code, quoted above. The Court of Commissioners of Alabama claims was by the terms of the act creating it a **court** of the United States—of limited jurisdiction to be sure—but nevertheless a **court**. It follows that the case is not at all in point.

The Appellees here do not constitute a *court* but as we have pointed out and as they admit they were created as

"an independent agency of the *executive branch* of the Government."

Plaintiff-in-error submits, therefore, that the court below erred materially when it decided as it did (Record, p. 46) because the language of the two statutes was similar. In the case at bar an executive department was created—in the Alabama claims case a **court** was created.

In the other cited case of *Phillips* against *Ballinger*, 37 App. D. C., 46, the case was decided against Mr. Phillips upon the ground that he was trying to enjoin an *anticipated* wrong. The court decided very properly that it cannot presume that the Secretary of the Interior in exercising one of the concededly legal functions of his office would resort to illegal means, namely, the consideration of improper evidence. But the right to the Secretary of the Interior to pass upon the question of denying Mr. Phillips permission to appear before his department was purely statutory, namely, an Act of Congress on July 4, 1884, 23 Stat. at L., 98 Chap. 181, Paragraph 684 of U. S. Compiled Statutes.

It may be noticed in passing that the language of this act is almost identical with the act giving the Secretary of the Treasury similar powers as quoted in the first paragraph of this point.

This case points again to the one conclusion, namely, that the power of an executive department to recognize or refuse to recognize agents is purely statutory.

Nor do we see much comfort for the Defendants-in-error in their other citation "*O'Brien's petition*, 79 Conn., 46."

In that case the Appellant had been given a hearing before the designated authorities on this application and had admitted certain facts. Nevertheless, the high court said on page 55:

> "it was proper for it (the Superior Court) to inquire whether the approval of the bar was withheld after

a fair investigation of the facts. This it did, and the findings shows that there was no ground for deeming their proceeding irregular or their action inconsiderate."

In the case at bar, if the court should come to the conclusion that the Board of Tax Appeals has the power to create a class of attorneys, all we ask is for this court, or rather the court below, to investigate whether the Board of Tax Appeals withheld their approval to petitioner's application after a *fair* investigation of the facts, and if it did not, then to annul their determination.

In the O'Brien case, supra, the highest court of the State of Connecticut decided that the Superior Court had acted properly in sustaining the action of the Committee of the Bar—after finding that the committee of the bar had made due investigation, that petitioner had been properly informed of its findings and had admitted them to be true.

The case therefore is not in point with the case of the petitioner in this court who has not been notified of any alleged charges, has not admitted any to be true, has clearly disproved in his reply, by documentary evidence, one of the most serious charges, and who rests his case on the merits entirely on the fact that the action of the Board of Tax Appeals was arbitrary to the extreme.

This is a vastly different state of affairs from that claimed by the Appellees in the aforementioned excerpt from their brief.

POINT IV.

If Congress had intended to give this board such power as is claimed by it, it would have said so specifically.

It must be assumed that if Congress intended that taxpayers could be represented only by a newly created

class of attorneys it would have said so in passing the statute creating this Board.

Reading Sec. 900 of the Revenue Act it seems that Congress intended just the opposite. Subdivision "H" of Sec. 900 upon which the respondents rely prescribes at the end that the meetings of the Board, etc., shall be prescribed "with a view of securing reasonable opportunity to taxpayers to appear before the Board * * * *with as little inconvenience and expense to taxpayers as is practicable.*" The restriction of appearance in behalf of taxpayers to a small class of attorneys admitted at the mere discretion of the respondents can certainly not be held to be a proper regard for the expenses to be incurred by a taxpayer.

Nor can this Court supply an alleged omission in the statute (Point I, ante).

In the case of *Matter of Cooper*, 22 N. Y., 67, at page 90, the New York Court of Appeals, discussing the power to admit attorneys, says:

> "It cannot be claimed as a part of the inherent power of the courts, or as resulting necessarily from their organization as courts."

If that be true, and we believe this to be so, no such inherent power can lie in an executive department.

POINT V.

If the respondents had the power to make rules for admission of attorneys they failed to exercise in a proper manner their prerogative of passing upon applications in the case of petitioner.

Petitioner alleges in his petition that the respondents acted arbitrarily and improperly in rejecting his application.

In defense to this charge the Board sets forth the following three propositions:

> One.—The petitioner was charged with infidelity to trust in a court proceeding in New York in disclosing confidential information which it was petitioner's duty to keep secret under the law and under his authority.
>
> Two.—The petitioner is not permitted to practice before the Treasury Department in behalf of claimants.
>
> Three.—The petitioner comes from Germany and is **only a naturalized citizen.**

The first allegation is disproved completely by the reply. The petitioner not only had the power but the duty to disclose the information in question and has obtained a court decision to that effect (fols. 64, 65 and 70, 71).

The point in the court proceeding cited by respondents, was whether, if the superior officer had discharged petitioner for disclosing over the objections of the superior officer what the statute mandatorily directed petitioner to disclose, such discharge could be considered a discharge "for political reasons." This question being answered in the negative by the court, petitioner's application for reinstatement by mandamus was denied.

It must be clear to the unbiased observer that in this instance alone the Board has not made such a careful study of the records as to warrant a conclusion that petitioner is not to be trusted to appear before it in behalf of taxpayer.

If respondents claim that they could get no further information from the record it was their duty to confront him with the facts and ask him for an explanation.

Failure to do so properly subjects them to the charge of having acted arbitrarily, tyrannically and improperly.

On the second allegation the respondents did not even go

to the records of a court. They took part of a record by an Executive Department, not in any way authenticated, not even provable in this case under the rules of evidence and because another executive department felt that petitioner should be chastised they construed this as a reason why they should deny petitioner the same due process of law which they denied him under the first allegation.

The court may properly observe that the respondents did not consider the whole record; it considered only the Commissioner of Internal Revenue's case, and failed to even read what the present petitioner said in reply to the Commissioner's charges; though it clearly appears from what they included in this record that the present petitioner offered considerable testimony and several witnesses, also took exception to the conclusions of law offered by the Commissioner.

Just one incident must suffice to show the bias.

In folio 59 of this record, Commissioner's counsel speaks of Mr. Goldsmith's letter advising one Fechner "to disregard any subpoena signed by Collector Edwards."

As the letter does not constitute part of this record the court might get the viewpoint that this also was an instance of Mr. Goldsmith's "refusal to recognize constituted authority" mentioned in the same folio of this record.

In explanation it may suffice to this court if we inform it that Collector Edwards was without jurisdiction of either the person or the subject matter of Mr. Fechner's Tax, as he lived in another district and had filed his return there. As to the limitations of the Collector and his process, the court is referred to the appropriate statutes.

But the question here is—is such advice, admittedly technical, given in violation of the rights of the United States, or in the slightest way immoral?

The appellant in his reply (fols. 66, 67) states his attitude pretty clearly. The records of the "Committee on Ways and Means" mentioned therein throw a clear light on the innuendoes of respondents' answer and charges.

These records are available to this court to show that petitioner has at the very least made out a proper case for a trial on the merits.

The respondents' failure to give him an opportunity to show that the charges were untenable to a judicially inclined mind, constituted such failure on their part, as to support petitioner's allegation of improper, arbitrary and tyrannical action.

The third allegation is too silly to lose any words about.

The due process clause in the Constitution of the United States should be enough to show this court that petitioner was entitled to be heard before an opportunity to make a living in his profession was taken away from him.

A substantial right of petitioner has been invaded by the respondents and this court may well determine that the respondents acted arbitrarily, tyrannically and capriciously in refusing enrollment to the petitioner.

In the leading U. S. case on the question of admission of attorneys in the courts, *Ex parte Garland,* 4 Wallace, 333, the court cites with approval the case of *Ex parte Secombe,* 19 Howard, 9, at page 13, viz.:

> "The power (to admit to practice), however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion."

And in *Ex parte Robinson,* 19 Wall, 513, the court says:

> "The principle that there must be citation before hearing, and hearing or opportunity to be heard before judgment, is essential to the security of all private rights. Without its observance no one would be safe from oppression wherever power may be lodged.
>
> That mandamus is the appropriate remedy in a case like this where the court below exceeded its jurisdic-

tion was decided in *Ex parte Bradley,* 7 Wallace, 364."

The Oldest Precedent on Record.

We read in *People* v. *Sullivan,* 126 Ill. App., 389, 397:

> "The justice and necessity of giving notice to a party, when a charge is made against him, which, if sustained, might deprive him of his rights, is a very ancient recognition. The Lord did not pass sentence on Cain without notice to him and an opportunity to be heard: '*And the Lord said unto him, Where is Abel, thy brother?*'"

The Appellees in their brief below were singularly silent on the charges of the Appellant that they have failed to act properly by conducting their proceedings without giving the Appellant notice of their charges and according him a hearing.

They merely contend that Appellant did not demand a hearing before them. But why should he have demanded a hearing? They notified him under date of September 5th that he would be informed if the committee desired him to appear before it (fol. 5, p. 3 of Record). Was the Appellant to anticipate that they would fail to question him if there was anything unusual in connection with his application? Is anybody compelled to ask for a hearing when he is not aware of any objections? It seems the argument is rather lame.

In reading the case of *Phillips* v. *Ballinger,* ante, we come across a citation from *Londoner* v. *Denver,* 210 U. S., 373, at 386, which we think fits the case at bar admirably.

> "Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall

> have the right to support his allegations by argument, however brief, and if need be by proof, however informal."

In the brief filed below, defendants-in-error said: "Appellant boldly asks this court to determine his fitness to appear in a representative capacity before another tribunal." This is a misstatement of the prayer for relief. If this court should decide, which it probably will not, that the Appellees had the power which they claim they have, we ask the court to find that they have failed in their duty to the Appellant by not giving him notice of their objections, and the Appellant could expect at least an alternative writ of mandamus upon the return of which plaintiff-in-error would be entitled to a trial upon the merits.

Court Below Reverses Itself.

The most peculiar aspect of this situation is the reversal of its opinion by the court below in regard to this question within two months of the rendering of the decision appealed from in this proceeding.

As it happens, petitioner at bar was also a party to that other proceeding (*Goldsmith* v. *Clabaugh and others constituting the Board of Accountancy for the District of Columbia*). In that proceeding the petitioner, besides asking for other relief, had asked for a Mandamus directing the said Board of Accountancy to permit him inspection of his application papers, which had previously been refused to him.

Upon this subject matter the court below said on May 4, 1925, the following:

> "An examination of our statute discloses that quasi judicial powers and responsibilities are conferred upon the Board thereby created, similar to those conferred upon the United States Board of Tax

appeals by Section 900 of the Act of June 2, 1924 (43 Stat., 253, 336), considered by us in *Goldsmith* v. *U. S. Board of Tax Appeals*, No. 4257, present term. Possessing quasi judicial powers, it necessarily follows that in its deliberations the Board must conform to recognized rules of procedure; that is, regard must be had in such deliberations to due process of law. By this and similar statutes in other jurisdictions, it has been recognized that the practice of public accountancy has assumed such importance and requires such experience and special training as to warrant regulation. While these statutes are primarily designed to protect the public, they should be construed and administered in such a way that capable and deserving applicants, possessing requisite character and qualifications, may not be denied the right to gain a livelihood by practicing their calling. These considerations should be observed in according due process of law to such applicants. Whispered gossip and undisclosed charges and suspicions find no place in this connection.

In *Garfield* v. *U. S.*, 32 App. D. C., 153, a proceeding before Department of the Interior for disbarment of an attorney, testimony had been taken by the Department without notice to the attorney and no copies given him. The court, defining due process of law, said: 'Due process of law in such cases require specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross examine the witnesses in support of them, an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the law and facts.' See also, *Hitchcock* v. *Smith*, 34 App., D. C., 521, 529, and *Turner* v. *Fisher*, 222 U. S., 204, 208.

Section 7 of the Act under consideration specifically provides that no certificate shall be revoked until

'notice of the cause for such contemplated action and the date of the hearing thereon by the board' shall have been given the holder, and that 'At all such hearings the corporation counsel of the District of Columbia or one of his assistants designated by him shall appear and represent the interests of the public.' It is just as important that an applicant for a certificate, who brings himself within the provisions of the statute, should have notice of any charges made against him and forming any basis for the action of the Board, as that the holder of a certificate should receive such notice in connection with the revocation thereof; and we think the statute clearly contemplates this, particularly the provisions of Section 5 requiring that 'The time and place of holding examinations shall be duly advertised for not less than three days (fol. 6) in one daily newspaper published in the District of Columbia,' plainly indicating that the examinations shall be public in all respects.

While the question whether an applicant is entitled to a certificate is addressed to the discretion of the Board, the exercise of that discretion must not be arbitrary or capricious, but governed by recognized principles. For a board composed of public officials, as is this Board, to refuse an application for a certificate for undisclosed reasons, is to violate the funda mental principles of justice and due process of law. Clearly, therefore, an applicant is entitled, *PRIOR TO FINAL RULING UPON HIS APPLICATION*, to be informed as to everything to be considered by the Board in his case, with full opportunity to present any relevant evidence he may wish to offer."

It seems impossible to reconcile this latest pronouncement of the court below with its decision in the action now before this court. A copy of the full decision in the other case is bound in with this brief marked "Ex-

hibit A," and the court will readily see that the court below holds the Board of Accountancy to be the same kind of a "Quasi Judicial" board which it held this Board of Tax Appeals to be.

Why then, is the Board of Accountancy compelled to do the public business openly and on the square, and not the Board of Tax Appeals, unless it be under the doctrine of ancient mythology, *"Quod licet Jovi, non licet bovi"?*

POINT VI.

Notwithstanding their powers of subpoena, the defendants form an administrative Board, and not a judicial tribunal.

The court below considered the section creating this Board of Tax Appeals as giving this board what it calls "Quasi Judicial" powers. It comes to this conclusion by reasoning that authority is conferred upon the Board and each member thereof to administer oaths, examine witnesses and require by subpoena the evidence and testimony of witnesses, etc. This reasoning is faulty. The power of subpoena and compelling the attendance of witnesses is given to many administrative officers. It is given to Congress itself and to all legislatures; also to Congressional and legislative committees. Your petitioner himself, while an examiner of municipal accounts in the State Comptroller's office had such power and used it effectively, but, to his regret, that did not make him a judge or even a "quasi judge."

The test in such cases is, whether or not the body or a person entrusted with the power of subpoena can enforce its subpoena directly or must do so by application to another tribunal.

Reflection will show this court that unless a tribunal can enforce its process by contempt of court or other appropriate proceedings, it is not a judicial tribunal.

This Board of Tax Appeals does not render any judgment whatsoever. It has none of the prerogatives of a court to enforce its findings. In the "Court of the Alabama Claims Commission" created under the act of June 23rd, 1874, and mentioned by the court below, the court was directed to file its judgment with the Secretary of State, whereupon the Treasurer of the United States was ordered to make payment according to the terms of judgment.

Here the Board of Tax Appeals files no judgment, but at best it sustains an appeal, a decision which is not binding upon either side of the controversy except that its only purpose is to prevent the Commissioner of Internal Revenue from making a summary assessment, and the Commissioner of Internal Revenue can still go into court and sue for the alleged taxes, while vice versa the taxpayer can still sue for a refund of taxes paid on summary assessment.

We must again point to the fact that the statute prescribes and the defendants admit that the Board of Tax Appeals is *an administrative agency of the government.*

POINT VII.

The Supreme Court of the District of Columbia has jurisdiction of the proceedings.

We are seeking here a writ of mandamus to compel the Board of Tax Appeals to permit the petitioner in this proceeding to appear before it and represent his clients.

That is the plain duty of the respondents, and this is the duty which they have refused to perform.

The petitioner has no other remedy.

That petitioner has no other remedy but mandamus, respondents admit (fols. 8, 15).

It seems to be settled law that the power of the United

States Supreme Court to grant mandamus in cases of excess or improper exercise of jurisdiction relates ONLY to inferior COURTS.

5 *Peters,* 190.

Cited with approval

Ex parte Bradley, 7 Wall, 364, at page 375.

In all other cases the power lies in the courts of original general jurisdiction, which in the case at bar is the Supreme Court of the District of Columbia.

This jurisdiction the court below has always assumed to be inherent to it. It seems certain that such jurisdiction rests in nobody but in that court.

POINT VIII.

The determination of the courts below should be reversed with costs, in both courts, and peremptory or alternative mandamus ordered as prayed for in the petition, together with such other relief as to this court seems proper.

Respectfully submitted,

H. ELY GOLDSMITH,
Certified Public Accountant,
State of New York,
Plaintiff-in-Error in Person,
Office and Post Office Address,
105 West Fortieth Street,
New York, N. Y.

Exhibit "A."

[fol. 1] IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

No. 4256

H. ELY GOLDSMITH, Certified Public Accountant of the State of New York, Appellant,

vs.

WILLIAM CLABAUGH, R. G. RANKIN, and JOHN J. MILLER, as Members of and Constituting The Board of Accountancy for the District of Columbia.

(Before Martin, Chief Justice, and Robb and Van Orsdel, Associate Justices.)

Appeal from a Judgment for the Defendants in the Supreme Court of the District of Columbia on Petition for Mandamus and Answer Thereto, to Which Answer a Demurrer was Interposed.

By the Act of February 17, 1923 (42 Stat. 1261), there was created "a board of accountancy for the District of Columbia." Sec. 1 of that Act prohibits any person, who has not received from the Board "a certificate of his qualifications to practice as a public accountant," from assuming the title of "certified accountant" or any abbreviation thereof. Sec. 2 defines a public accountant "as a person skilled in the knowledge and science of accounting, who holds himself out to the public as a practicing accountant for compensation," etc. By section 3 there is created a board of accountancy consisting of three members, appointed by the Commissioners of the District of Columbia. This section further provides that "The board shall organize by the election of a president and a secretary and a treasurer, and may make all rules and regulations necessary to carry into effect the purposes of this Act." Sec. 4 prohibits the granting of a certificate to any person other than a citizen of the United States or who has not declared his intention of becoming such, or who is not of good moral character. The applicant must be a graduate of a high school or possess equivalent education, or be one who, "in the opinion of the board, has had sufficient commercial experience [fol. 2] in accounting," etc. Sec. 5 requires "That all examinations provided for herein shall be conducted by the board." Sec. 6 authorizes the Board, "in its discretion," to waive an examination and issue a certificate as certified public accountant "to any person possessing the qualifications mentioned in section 4 of this Act who is the holder of a certificate as certified public accountant issued under the laws of any State or Territory which extends similar privileges to certified public accountants of the District of Columbia, provided the requirements for such certificate in the State or Territory which has granted it to the applicant are, in the opinion of the board, equivalent to those herein required, * * *" Sec. 7 authorizes the revocation of a certificate "for unprofessional conduct or other sufficient cause: Provided, That notice of the cause for such contemplated action and the date of the hearing thereon by the board shall

have been mailed to the holder of such certificate at his or her regis tered address at least twenty days before such hearing. No certificat issued under this Act shall be revoked until the board shall have hel such hearing, but the nonappearance of the holder of any certificate after notice as herein provided, shall not prevent such hearing * * *" Sec. 8 relates to fees to be charged by the Board and b Sec. 9 a penalty is provided for practicing without a certificate o after revocation thereof.

In his petition the plaintiff based his right to a certificate upon th fact that he held a certificate as certified public accountant pursuan to Sec. 80 of the General Business Law of the State of New York and alleged that this law "provides for similar privileges to Certifie Public Accountants of the District of Columbia." Plaintiff furthe alleged therein that he had made application to the Board in th District of Columbia for permission to examine his "application an other papers on file with reference to Petitioner's application, an that this request had been refused. He also alleged that he ha made similar application respecting all the applications on file wit the Board, which request likewise had been refused.

[fol. 3] In their answer the defendants raised no question as to th citizenship, moral character or education of the plaintiff but di challenge the averment that the New York law relied upon extend similar privileges to certified public accountants of the District o Columbia. Answering the averment that plaintiff had been denie the privilege of inspecting his own application and other papers o file with reference to it, the defendants alleged that they had offere to furnish him a copy of his application, but admitted that they ha refused to exhibit either the original application or the other pape on file pertaining to it, the answer alleging that these had becom "a part of the confidential files" of the Board and, further, "tha for the proper and efficient discharge of their duties as constitutin the Board of Accountancy for the District of Columbia, it is neces sary that they should so conduct the work of said Board as to b in position to obtain as full information as possible in regard to th various applicants who may file applications with them, so as to ac advisedly in granting or refusing such applications; and that, if the may be required by any applicant to disclose any matters in th files relating to his application or to exhibit to him any of the pape or documents connected therewith, they would thereby hampe themselves greatly in obtaining the information so necessary in re gard to the various applicants, and would be able to render less usefu and efficient service as the Board of Accountancy of the District o Columbia. These respondents are further advised and believe, an therefore aver that the communications received by them from tim to time in relation to various applicants who have filed application with them for certificates as certified public accounts are confidentia and privileged in character and that it is the duty and obligatio of these respondents to respect the confidential and privileged cha acter thereof."

It is unnecessary to state the answer of the defendants to the state ment of the plaintiff that he had been denied access to all other ap plications on file.

[fol. 4] The court below overruled a demurrer to the answer and dismissed the petition, on the ground that the law of New York does not extend to certified public accountants of the District of Columbia a privilege similar to that accorded by the local statute. The court further ruled that the defendants had not denied the plaintiff "any right that he possesses, in refusing him the access to their records."

Under the New York statute upon which plaintiff relies, the holder of a certificate issued under our statute, to be entitled to registration in New York without examination, must have practiced three years under the certificate granted him here. In other words, while the holder of a New York certificate possessing the qualifications mentioned in Section 4 of our statute, is entitled, in the discretion of our Board, to immediate registration here without reference to the date of his registration in New York, the holder of a certificate issued by our Board is not entitled to registration in New York without examination until he has practiced three years under our certificate. It therefore is apparent, without further discussion, that the New York statute does not extend a "similar privilege" to certified public accountants of the District of Columbia, within the meaning of Section 6 of our statute.

The conclusion we have reached on the first point results in an affirmance of the judgment, but, in view of the importance of the second question and to its probable recurrence in other cases, we deem it our duty to consider that question.

An examination of our statute discloses that quasi judicial powers and responsibilities are conferred upon the Board thereby created, similar to those conferred upon the United States Board of Tax Appeals by Section 900 of the Act of June 2, 1924 (43 Stat. 253, 336), considered by us in Goldsmith vs. U. S. Board of Tax Appeals, No. 4257, present term. Possessing quasi judicial powers, it necessarily follows that in its deliberations the Board must conform to recognized rules of procedure; that is, regard must be had in such deliberations to due process of law. By this and similar statutes in [fol. 5] other jurisdictions, it has been recognized that the practice of public accountancy has assumed such importance and requires such experience and special training as to warrant regulation. While these statutes are primarily designed to protect the public, they should be construed and administered in such a way that capable and deserving applicants, possessing requisite character and qualifications, may not be denied the right to gain a liv-lihood by practicing their calling. These considerations should be observed in according due process of law to such applicants. Whispered gossip and undisclosed charges and suspicions find no place in this connection.

In Garfield vs. U. S., 32 App., D. C., 153, a proceeding before Department of the Interior for disbarment of an attorney, testimony had been taken by the Department without notice to the attorney and no copies given him. The court, defining due process of law, said: "Due process of law in such cases require specific charges, due notice of the same, an opportunity to make specific answers to them, an opportunity to cross examine the witnesses in support of them,

an opportunity to adduce testimony in contradiction of them, and an opportunity for argument upon the law and facts." See also, Hitchcock vs. Smith, 34 App., D. C., 521, 529, and Turner vs. Fisher, 222 U. S. 204, 208.

Section 7 of the Act under consideration specifically provides that no certificate shall be revoked until "notice of the cause for such contemplated action and the date of the hearing thereon by the board" shall have been given the holder, and that "At all such hearings the corporation counsel of the District of Columbia or one of his assistants designated by him shall appear and represent the interests of the public." It is just as important that an applicant for a certificate, who brings himself within the provisions of the statute, should have notice of any charges made against him and forming any basis for the action of the Board, as that the holder of a certificate should receive such notice in connection with the revocation thereof; and we think the statute clearly contemplates this, particularly the provisions of Section 5 requiring that "The time and place of holding examinations shall be duly advertised for not less than three days [fol. 6] in one daily newspaper published in the District of Columbia," plainly indicating that the examinations shall be public in all respects.

While the question whether an applicant is entitled to a certificate is addressed to the discretion of the Board, the exercise of that discretion must not be arbitrary or capricious, but governed by recognized principles. For a board composed of public officials, as is this Board, to refuse an application for a certificate for undisclosed reasons, is to violate the fundamental principles of justice and due process of law. Clearly, therefore, an applicant is entitled, prior to final ruling upon his application, to be informed as to everything to be considered by the Board in his case, with full opportunity to present any relevant evidence he may wish to offer.

But it by no means follows that one applicant is entitled to consume the time of the Board in inspecting the files of other applicants. The granting of a right is one thing, while the gratification of mere curiosity is quite another.

The judgment is affirmed, with costs.

Affirmed.

Chas. H. Robb, Associate Justice.

Endorsed: H. Ely Goldsmith, Certified Public Accountant &c., Appelant, vs. William Clabaugh, R. G. Rankin and John J. Miller as Members of and Constituting The Board of Accountancy for the District of Columbia. Opinion of the Court per Mr. Justice Robb. Court of Appeals. District of Columbia. Filed May 4, 1925. Henry W. Hodges, clerk. A true copy. Test: Henry W. Hodges, Clerk of the Court of Appeals for the District of Columbia. (Seal of Court of Appeals, District of Columbia.)

INDEX

AUTHORITIES CITED

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Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM 1925

No. 320

H. ELY GOLDSMITH, CERTIFIED PUBLIC ACCOUNTANT of the State of New York, Plaintiff in error

v.

UNITED STATES BOARD OF TAX APPEALS

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF DEFENDANT IN ERROR

The opinion of the Court of Appeals of the District of Columbia is to be found at pages 45 to 47, inclusive, of the Record, and is officially reported in 4 Fed. Rep. (2d) at page 422.

JURISDICTION

According to the petition for this writ of error filed March 5, 1925, the jurisdiction of this Court is invoked under Section 250, paragraph 5, of the Judicial Code because (1) the issue is whether there exists any power in the Board of Tax Appeals to regulate the admission of persons to appear before it as agents or attorneys for taxpayers; (2)

the scope of that power; and (3) the validity and authority claimed and exercised by the Board to regulate such practice by rules and regulations. (Rec. 48.)

The writ is taken to review a judgment of the Court of Appeals of the District of Columbia dated March 2, 1925 (Rec. 48), affirming a judgment of the Supreme Court of the District of Columbia, dated November 13, 1924 (Rec. 42), dismissing plaintiff's petition for writ of mandamus, to compel the Board of Tax Appeals to admit him to practice before the board.

THE CASE

The Board of Tax Appeals, under Section 900, subdivision (h) of the Revenue Act of 1924, Act of June 2, 1924, ch. 234, 43 Stat. 253, 337, which reads "The proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe" promulgated Rule 2 of the Board, which sets forth the requirements for admission to practice before the Board.

The plaintiff, a certified public accountant of New York, with offices in New York City, filed an application to be admitted to practice before it, in accordance with Rule 2. This application was referred to a special committee, composed of certain members of the Board, to examine into the character, integrity, and qualifications of the petitioner. (Rec. 8.) After due consideration, and

as a result of a careful examination made by the Committee, the application was denied by a unanimous resolution of the Board. (Rec. 8.)

Without requesting a hearing in the matter, the applicant filed a petition for a writ of mandamus in the Supreme Court of the District of Columbia. The individual members of the Board made a joint answer (Rec. 7) to the petition (Rec. 7–10), annexing thereto testimony and other documents submitted to the Committee on Enrollment and Disbarment of the Treasury Department, which had theretofore rejected a similar application of plaintiff to practice before that Department. (Rec. 11–36.) The plaintiff filed a reply to the answer. (Rec. 37–41.) The Board then demurred to the reply of the plaintiff. (Rec. 41.) The Supreme Court of the District of Columbia sustained the demurrer and dismissed the petition. (Rec. 42.) The Court of Appeals of the District of Columbia has affirmed that judgment. (Rec. 48.)

THE FACTS

The pleadings exhibit the following facts:

By Section 900 (a) of the Revenue Act of 1924, ch. 234, 43 Stat. 253, 336, Congress created the United States Board of Tax Appeals, as an independent agency in the executive branch of the Government, with power to hear and determine appeals by taxpayers in certain classes of revenue cases set forth in Sections 274, 279, 308, and 312 of the

Revenue Act of 1924, *id.* pages 297, 300–301, 308–309, 310–311, respectively.

Subdivision (h) of Section 900 provides "The proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe." (43 Stat. 337.)

Pursuant to the authority thus conferred the Board promulgated Rule No. 2, relative to the admission of persons to practice before the Board on behalf of taxpayers, which reads as follows:

> A register of persons entitled to practice before the board will be maintained by the board in which will be entered the names of all such persons. Firms will not be admitted or recognized.
>
> The following classes of persons may be admitted to practice before the board:
>
> (*a*) Attorneys at law who are admitted to practice before the Supreme Court of the United States or the highest court of any State or Territory or the District of Columbia.
>
> (*b*) Certified public accountants duly qualified under the law of any State or Territory or the District of Columbia.
>
> An application under oath for admission to practice shall be addressed to the United States Board of Tax Appeals, Washington, D. C., and must state the name, residence address and business address of the applicant, and the time and place of his admission to the bar, or qualification as a certified

public accountant. Such application shall also state whether the applicant has ever been suspended or disbarred as an attorney in any court, or his right to practice as a certified public accountant suspended or revoked in any jurisdiction. Such application shall be accompanied by a certificate of the clerk of the court in which the applicant is admitted to practice to the effect that he has been so admitted and is in good standing; or a certificate by the proper State, Territorial, or District authority to the effect that the applicant is a certified public accountant in good standing, duly qualified and entitled to practice in such State or Territory or the District of Columbia.

The board may in its discretion deny admission, suspend or disbar any person.

The board shall have the right at any time to inquire under oath into the terms and circumstances of any contract of employment of an attorney or certified public accountant by the taxpayer he represents.

Any individual taxpayer or member of a taxpayer partnership or officer of a taxpayer corporation may appear for himself or such partnership or corporation upon adequate identification to the board. (Rec. 2–3.)

The plaintiff filed an application with the Board of Tax Appeals, as required by Rule 2, annexing thereto a certificate showing the appellant to be a certified public accountant of the State of New York, with offices in the city of New York. (Rec. 3.)

Thereafter, on September 5, 1924, the Chairman of the Board acknowledged receipt of the application and stated that it had been referred to a committee for investigation, and that in due course he would notify him of its action in the premises. (Rec. 3.)

On September 27, 1924, the Secretary of the Board advised the plaintiff that his application had been received, considered, and denied. (Rec. 4.)

On October 17, 1924, the plaintiff filed a petition for a writ of mandamus in the Supreme Court of the District of Columbia. In his petition he alleges that he is a reputable practitioner of his profession, in good standing in his community, has never been convicted of any crime, and is generally respected for his ability and fidelity by a large clientele; that the Board refused to permit him to appear before it; that he is prevented from exercising his lawful calling, and is debarred from his just legal rights in appearing on behalf of his clients; that he has no other clear, adequate, efficient, or speedy remedy against the arbitrary, wrongful, tyrannical, and capricious action of the Board except by way of mandamus to compel the Board to enroll him as an Attorney. The usual prayer is then made for the issuance of a writ of mandamus. (Rec. 5.)

A rule to show cause was issued on October 17, 1924. (Rec. 6–7.)

The members of the Board, as individuals, answering the petition and rule, affirmatively stated

that the Board is an arm or branch of the Government of the United States; that the latter has not consented to be sued; that the members of the Board are without authority to give such consent on behalf of the United States, but consented in order that the rights of the plaintiff, if any he has, might be adjudicated promptly and expeditiously, that the cause proceed against them as if they had been individually named as parties respondent. (Rec. 10.)

Denial is therein made that plaintiff is a reputable practitioner of his profession, and in good standing in his community. (Rec. 8.) It was alleged that his application for admission to practice was referred to a special committee to examine into the character, integrity, and qualification of the applicant; that this committee caused examinations to be made of the records of the Treasury Department, of the courts of the State of New York, and of other sources of information, with the result that the committee recommended to the Board the application be denied; that a resolution was duly unanimously adopted by the Board denying his application; that the action of the Board was based upon its judgment and determination that the petitioner is lacking in integrity, is of bad character and reputation, is untrustworthy, and is unworthy of the confidence necessarily imposed by any judicial, quasi-judicial or administrative body of the Government in practitioners appearing before it to represent taxpayers or clients (Rec. 8); that its

judgment and determination was founded upon certain facts which the members of the Board believe to be true and credible, namely, that during the year 1910 or 1911, the plaintiff was employed by the State Comptroller of the State of New York, under Civil Service, as an examiner of municipal accounts; that during that time he violated the duties of his position and the confidence imposed on his integrity and character; violated and ignored the instructions given him regarding the making public of certain information which it was not, by right or authority, his privilege under the duties of his position to make public, which conduct on his part resulted in his discharge from that employment; that he instituted mandamus proceedings in the courts of New York for reinstatement which were decided against him. (*People ex rel Goldsmith* v. *Travis*, 167 App. Div. 475, 219 N. Y. 589 (Rec. 9); that on March 14, 1921, petitioner filed with the Secretary of the Treasury of the United States, an application for enrollment as an accountant or agent to represent others before the Treasury Department; that charges were filed against petitioner by the Commissioner of Internal Revenue in opposition to his application, and that a hearing was granted him thereon before the Committee on Enrollment and Disbarment of the Treasury Department and a true stenographic record of the testimony was made (Rec. 9), with the result that his application to practice before the Treasury Department was rejected upon the

ground that he was not a person qualified to represent others before the Department. (Rec. 9.) A true copy of material portions of the record relating to petitioner's conduct, character, ability, standing, etc., at the hearing before that Department was annexed to the answer as an Exhibit and is to be found at pages 29–33 of the Record.

The plaintiff, replying to that answer, consented that the case proceed against them individually and, therefore, the members of the Board have been considered by the Supreme Court of the District of Columbia as the real parties in interest. (Rec. 37, 42.) The record does not disclose conclusively whether this was true with regard to the Court of Appeals, but we may fairly presume that it is. He denied that he was guilty of any misconduct while employed in the office of the New York State Comptroller, and averred that he was discharged for political reasons. (Rec. 38.) He, however, makes no denial of the truth of the evidence adduced against him in the proceedings before the Committee on Enrollment and Disbarment of the Treasury Department, but does except to the consideration of that matter by the Board on the ground that it was at least hearsay evidence. (Rec. 39.)

The members of the Board demurred to plaintiff's reply upon these grounds:

1 and 2. That he had no vested or inherent right to be admitted to practice before the Board.

3 and 4. That his admission to practice is a question to be determined and decided by the Board alone; it is a matter that lies within the sound discretion of the Board, and it not subject to judicial review.

5. That such question is a matter which does not come within the jurisdiction of the court in a mandamus proceeding. (Rec. 41.)

Both Courts below have held in favor of the Board, the demurrer having been sustained and the petition dismissed. (Rec. 42, 48.)

ARGUMENT

I

The plain purpose of section 900 (h) was to clothe the board with complete authority to prescribe its own procedural system, and included therein is the manifest right of the board to regulate the admission of persons to practice before it

Section 900 (h), Revenue Act of 1924, reads:

> The proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe.

The terms of that Section are so clearly expressed that in our view the proposition involved is narrowed to the inquiry as to whether the power exercised by the Board relative to the admission of persons to practice before it is not *ex necessitate* within the board language of the statute.

The plaintiff contends that there is no express statutory authority, that is, that the statute does not, in so many words, expressly authorize the Board to regulate the practice, and that as it has no common-law rights, or any implied authority in regard thereto, Rule 2 is invalid.

Assuming, *arguendo,* that there is no express or implied statutory authority, or common-law right therefor, this does not in any way aid the plaintiff, for the reason that there is no inherent or implied right in any person to practice before the Board, (*Phillips* v. *Ballinger,* 37 App. D. C. 46, 50) and the right only arises when expressly or impliedly so granted. Therefore, the position taken by the plaintiff is fundamentally unsound, because it is predicated upon a false premise.

The complete story of why this Board was founded by Congress, its purposes, and the procedure before it, is concisely stated by Mr. Green, Chairman of the Ways and Means Committee of the House, in his report (No. 179, dated Feb. 11, 1924), which accompanied the bill H. R. 6715, now the Revenue Act of 1924. See also Conference Report No. 844, dated May 24, 1924, 68th Cong., 1st sess. (H. R. 6715), pages 42, 43; *The United States Board of Tax Appeals,* by J. Gilmer Korner (Chairman of the Board), October, 1925 issue American Bar Association Journal, at page 642, and *Practice before the United States Board of Tax Appeals,* by J. G. Korner, jr., The Journal of

Accountancy, Vol. XL, No. 1 (July issue), 1925, p. 1.

It is to be observed that the statute in so many words makes the Board "an independent agency in the executive branch of the Government." (43 Stat. 338.)

The reasons therefor, as stated by Mr. Green, were these: Prior to the establishment of the Board, the taxpayer disputing the tax assessment against him, or the tax collected from him, was compelled to appeal to the Commissioner of Internal Revenue, who had established what was known as the Committee on Appeals and Review, to allow those appeals for him. The objection to that remedy, however, was that the taxpayer did not obtain an impartial review of his claim; that is, to say, in the hearing on the appeal, the person who was to decide the matter acted both as advocate and judge, since he was compelled both to protect the interests of the Government and to decide the questions involved.

After stating the objections to the old procedure just mentioned above, he then goes on to say (p. 8):

> To meet the objections given above, the committee recommends that there be established a Board of Tax Appeals * * *. This Board is entirely outside the Treasury Department * * *. The divisions of the board are to sit locally throughout the United States, with a view to securing reasonable opportunity to taxpayers to appear before the divisions with as little in-

> convenience and expense to the taxpayers as is practicable. * * *
>
> Under the provisions of the proposed bill * * * the taxpayer may, prior to the payment of the additional assessment * * * appeal to the Board of Tax Appeals and secure an impartial and disinterested determination of the issues involved.

It is plain, therefore, that the primary object of Congress in establishing this Board was to afford a means by which a taxpayer could, beyond question, obtain a fair and disinterested determination of his claim. This Court will observe, however—and this is very important—that the Act nowhere provides that a taxpayer shall appear personally before the Board to prosecute his claim, and not through an agent or representative. Indeed, under the old procedure, when the taxpayer was forced to appeal to the Commissioner of Internal Revenue, that was not necessary; the corollary is that the Act contemplates a practice of attorneys or agents before the Board. In fact, it has been the rule of the Treasury Department for years to permit a taxpayer to prosecute his claim through an agent or representative, as provided by the Act of July 7, 1884, ch. 334, 23 Stat. 236, 258–259. A roll of attorneys is maintained, and a standing Committee on Enrollment and Disbarment handles matters appertaining to the admission and suspension of attorneys. (Rec. 29.)

While Congress has radically changed the character of the Board handling these tax claims—that is to say, it has established an independent Board, as contradistinguished from the former unsatisfactory Board of Appeal and Review in the Treasury Department—there is nothing whatever in the history of the statute, or in the act itself, which in any way evinces a purpose to effect a change in the procedure with reference to the practice of persons before the new Board. The whole difficulty, which brought about the change, seems to have been confined to the nature of the old Board and the imperfections of the system thereunder. The question of the practice of persons before either board does not appear to have been considered at all from the standpoint of the authority to regulate it.

There is in the report of Mr. Green, *supra,* a recognition of the practice followed by the old Board, as well as a discussion of the practice before the new Board. In this connection, at page 8, he says:

> * * * *Both the Government and the taxpayer will appear before the board and present their cases, and the decision of the board will be final as to the amount of the tax to be paid.* * * *
>
> The divisions of the board will sit locally throughout the United States to enable taxpayers to *argue their cases* with as little inconvenience and expense as is practicable. This proposal meets all the objections that

> have been raised as to the existing system, *and at the same time provides for a flexible and informal procedure* which will permit the board to determine expeditiously the cases brought before it on appeal. (Italics supplied.)

It is apparent, therefore, that Congress contemplated that the Government and the taxpayer should "present" and "argue" their cases before the Board, substantially in the same way as a case is prosecuted in a court of law. This is borne out, too, by the statement of Mr. Green in explaining the bill to the House:

> The cases of both the Government and the taxpayer are presented before the board, which acts impartially and the *practice there is similar to that before the Interstate Commerce Commission.* (Cong. Rec. Vol. 65, Part 3, page 2429, 68th Cong. 1st Sess.—Italics supplied.)

The practice before the Interstate Commerce Commission is very similar to that followed in the courts; that is, the commencement of proceedings by petition, the answer, the hearing, the argument, etc., by attorneys for the carrier or the shipper. But most important of all, so far as the case at bar is concerned, is the fact that the Commission controls by rules the admission and suspension of attorneys. That, of course, was true as to the old Board of the Treasury Department. The former exercised such control under the Act of

February 4, 1887, ch. 104, Sec. 17, 24 Stat. 379, 386, while the latter is under the Act of July 7, 1884, *supra.*

Generally speaking, therefore, the Interstate Commerce Commission partakes of the nature of an important quasi-judicial body, as contradistinguished from a mere departmental committee or board, such as the old Board of Appeal and Review in the Treasury Department. As thus constituted it is far more closely akin to a court than to the ordinary department committees or boards.

Congress has created the Board of Tax Appeals along very much the same lines, giving to it very similar powers to that possessed by the Commission, as a reading of the two acts will clearly show. Indeed, there is shown on every hand—in the history of the bill and in the statute itself—a positive legislative intention to impress the Board with a quasi-judicial status comparable to that of the Interstate Commerce Commission, with far more powers than that enjoyed by the old Board in the Treasury Department.

Plainly the Board was intended to be a dignified tribunal, a court in everything but name. Its members were to be appointed by the President, confirmed by the Senate, and receive a salary of $7,500 a year. It was to have a chairman and a seal to be judicially noticed. Like the Interstate Commerce Commission, it could be divided into divisions which should hear and determine appeals, and upon the expiration of 30 days the decisions and

findings of the division should become the decision and findings of the Board, unless the chairman should direct a decision to be reviewed by the Board; and in proceedings in court the findings of the Board were to be *prima facie* evidence of the facts. Hearings were to be public and its reports were to be officially published and were to be competent evidence in all courts of the United States and of the several States, without further proof or authentication. Its subpœnas could compel the attendance of witnesses and the production of papers from any place in the United States at any designated place of hearing, and witnesses were to be paid the same fees and mileage as were paid witnesses in the courts of the United States.

The fact that the Commission and the Treasury Department exercised the control over the practice of attorneys under specific acts is not material here, because such a matter is strictly one of procedure, and that question has been left entirely to the sound discretion of the Board under the broad terms of Section 900 (h). Moreover, the importance of such a power to the Board to enable it efficiently to carry out the purposes of the act and to protect both the taxpayer and the government at once suggests that if Congress had intended to provide otherwise it would certainly have done so in unmistakable language, because it would, indeed, have been a radical departure. Furthermore, if everybody be permitted to practice before this Board, without regard to his intellectual or moral

qualifications, it will result in embarrassment to the Board because of incompetency in the presentation of cases, and beyond question it would set the door wide open to fraud. In this connection it is pointed out by Mr. Korner, in his address printed in the American Bar Association Journal, *supra*, page 644:

> * * * The issues presented by such cases run the whole gamut of law—corporations, trusts, domestic relations, banking, torts, partnerships, contracts, real property, and even criminal law where fraud is involved. There is no specialist in the profession whose talents are not needed in constructing (*sic*) and administering this broad and important branch of the law.

It is interesting to note what Mr. Korner states with regard to the work of the Board:

> The board has been in existence a little over a year. It was about two months after organization before the board began to function in the hearing of cases. During the year ending July 1, 1925, 5,220 appeals were filed. Of that number the board has disposed of and taken under submission 2,422. We calendar on an average of 180 cases per week, and thus far we have kept within 30 to 45 days of joinder of issue in all appeals. By that I mean that at our present rate, we have been able to hear appeals within 30 to 45 days after they are at issue. (*Id.* p. 644.)

It is plain to see, therefore, that the narrow construction which the plaintiff would have us give to the Act is manifestly inconsistent with the whole scheme of the statute, and furthermore, if followed, it would produce nothing but destructive results. We cannot, therefore, indulge in such an interpretation.

In conclusion on this point, we call attention to *Manning* v. *French*, 149 Mass. 391, wherein the Court constructed the Act of June 23, 1874, ch. 459, Sec. 3, 18 Stat. 245, 246, creating the Alabama Claims Commission, and empowering it to make rules for regulating the forms and mode of procedure before it—a very similar statute to the one under consideration. Section 3 provides:

> That the said court be, and it is hereby, authorized * * * to make all needful rules and regulations * * * for regulating the forms and modes of procedure before the said court, and for carrying into full and complete effect the provisions of this act.

The court interpreted that section as a grant of power to make rules for the admission of persons to prosecute claims before the court as agents or attorneys for claimants. In this connection, Judge Field, for the court, at page 398, said:

> Under the powers granted by the acts of Congress, and especially under the power granted by § 3 of the act of June 23, 1874, we are of opinion that the court, having authority to make rules for regulating the

> forms and modes of procedure before it, and for carrying into full and complete effect the provisions of the act, had, as included in this grant of power, the authority to make rules for the admission of persons to prosecute claims before the court as agents or attorneys for claimants. It is manifest that it was not intended by the statutes that claimants should be compelled personally to present their claims.
>
> * * * * *
>
> If the court had the power to prescribe by rule the qualifications of attorneys to be admitted to practise before it, the court had the power to determine whether the persons who asked to be admitted had the requisite qualifications, and whether persons who had been admitted retained the requisite qualifications. (P. 399.)

The Court of Appeals, in its opinion in the case at bar, in considering the *Manning case,* in conclusion said:

> The language of that statute was no more comprehensive than that before us and the reasoning and conclusion of the court are apposite here. (Rec. 46.)

By writ of error the *Manning case* was brought to this Court, but it was dismissed for lack of jurisdiction. 133 U. S. 186.

II

The plaintiff has utterly failed to establish that the Board in denying his application acted arbitrarily or capriciously in the matter, or that there has been an abuse of discretion. The record plainly shows that the action taken was fully justified

It will be noticed that the qualifications of applicants for admission to practice are set forth in Rule 2. (Rec. 2, 3.) But therein the Board reserves the right to deny admission.

When the application of plaintiff was filed it was then referred for investigation and recommendation to a special committee composed of members of the Board. (Rec. 3.) When a report thereon was submitted to the whole Board, a resolution was passed unanimously rejecting it. (Rec. 8.) The reasons which prompted such action are set forth in detail in paragraph 17 of the answer filed by the several members of the Board. (Rec. pp. 8–10.)

According to the answer the investigation of the application by the Special Committee disclosed in substance these facts, and sources of information: That appellant had been discharged from a position in the Comptroller's Office of the State of New York for alleged violation of the duties of his position, and that mandamus proceedings to compel his reinstatement had failed in the courts of that State; that on March 14, 1921, he had filed with the Secretary of the Treasury an application for enrollment as an accountant or agent to represent

others before the Treasury Department; that charges were preferred against him by the Commissioner of Internal Revenue; that, after an extended hearing before the Committee on Enrollment and Disbarment of that Department (in which appellant appeared, cross-examining witnesses and himself testified), his application was rejected upon the ground that he was not a person qualified to represent others before the Department. (Rec. 9.) A copy of the material portions of the record in that proceeding is to be found in the Record at pages 11 to 36, inclusive, and justifies the decision of the Board not to permit him to practice before it.

The Court of Appeals in the case at bar, in considering the question of whether there had been an abuse of discretion or an arbitrary exercise thereof by the Board, says:

> Appellant contented himself with excepting " to the consideration of this matter by the respondent (Board) on the ground that it was at best hearsay evidence."
>
> In view of the fact that appellant participated in that hearing [before the Treasury Department] and was a witness there, we are of the opinion that the Board properly considered that record, along with other evidence, in reaching its conclusion. It is significant that appellant does not challenge any of the testimony in that proceeding. We shall not attempt to analyse the evidence further, since it was of such a character as,

in our view, fully to justify the conclusion reached by the Board. (Rec. 47.)

Appellant claims that he has not been given a hearing, but the Record fails to show that he ever demanded or requested a hearing by the Board on his application. There was certainly no duty on the part of the Board to initiate a hearing (See 33 Ops. Attys. Gen. 17; *O'Brien's Petition,* 79 Conn. 46), in view of its conclusion that the facts and information before it justified its action.

CONCLUSION

The Board has full authority to control by rules the admission of persons to practice before it under the broad terms of Section 900 (h), Revenue Act of 1924, such a matter being strictly one of procedure.

The plaintiff has wholly failed to show that the Board has acted in abuse of its discretion, or in an arbitrary or capricious manner, and in the absence of such a showing a writ of *mandamus* will not issue. Moreover, the Record discloses that the Board has acted fairly, impartially, and reasonably in the entire matter.

It follows, therefore, that the judgment below should be affirmed.

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NOVEMBER, 1925.

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